The Solicitors' Journal

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CURRENT TOPICS

Royal Commission on Taxation

IT was announced in a written reply in the House of Commons on 14th December that the chairman of the Royal Commission on the Taxation of Profits and Income will be LORD JUSTICE COHEN. The King has approved the appointment of the following members: Mrs. VERA ANSTEY, Mr. H. L. BULLOCK, Mr. W. S. CARRINGTON, Mr. W. F. CRICK, Sir THOMAS H. GILL, Mr. J. E. GREENWOOD, Sir GEOFFREY HEYWORTH, Mr. J. R. HICKS, Mr. N. KALDOR, Mr. W. J. KESWICK, Miss LUCY S. SUTHERLAND, Mr. J. M. TUCKER, K.C., and Mr. G. WOODCOCK. The terms of reference are: To inquire into the present system of taxation of profits and income, including its incidence and effects, with particular reference to the taxation of business profits and the taxation of salaries and wages; to consider whether, for the purposes of the national economy, the present system is the best way of raising the required revenue from the taxation of profits and income, due regard being paid to the points of view of the taxpayer and of the Exchequer; to consider the present system of personal allowances, reliefs, and rates of tax as a means of distributing the tax burden fairly among the individual members of the community; and to make recommendations consistent with maintaining the same total yield of the existing duties in relation to the national income.

Solicitors and Accountants

THE Council of the Institute of Chartered Accountants in England and Wales has, on the report of its Parliamentary and Law Committee, decided that a statement be published reminding members that the drafting and settling of memoranda and articles of association of companies should properly be left to solicitors. Inquiries from members with regard to certain cases of conversions of private businesses to limited companies elicited the reply that a member might assist in connection with the formation of a company and in doing so might give his views as to the contents of the memorandum and the articles of association, particularly on the clauses relating to accounts. The Council is advised, it is stated, that a member who prepared articles or memoranda of association would not by so doing be infringing the law but nevertheless it is held that a member should not draft or settle the documents in final form, any suggestions he makes being with a view to assisting the legal advisers responsible for putting them in legal form. We commend the statement, not merely out of self-interest, but also because it is so obviously in the public interest that the specialised functions of the various professions should be clearly defined and demarcated.

Appeals from Courts Martial

THE text of the Courts-martial (Appeals) Bill was published on 14th December. It provides for the establishment of a court of appeal for the Navy, Army, and Air Force, to which a person convicted by a court martial may, with the leave of the court, appeal against conviction. There will be no appeal against sentence, but the royal prerogative of mercy is to be preserved with regard to sentence. The power to quash a

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court martial conviction under the royal prerogative, unless and until the court has begun the hearing of an application for leave to appeal, is also preserved. The judges are to be the Lord Chief Justice, all the puisne judges of the High Court, judges of the High Court of Justiciary in Scotland nominated by the Lord Justice General, judges of the High Court in Northern Ireland nominated by the Lord Chief Justice of Northern Ireland, and specially qualified persons to be appointed by the Lord Chancellor. The court is to be deemed to be duly constituted if it consists of at least three judges, of whom at least one is the Lord Chief Justice or a puisne judge of the High Court. The decision of the court will be final, subject to a further right of appeal by either party to the House of Lords on a point of law of exceptional public importance.

Development Charge: Advance Assessment

THE Central Land Board have stated (Practice Notes, para. 121) that they cannot normally assess a development charge under Pt. VII of the Town and Country Planning Act, 1947, unless the development is likely to take place within twelve months. On the 15th December, however, the Board announced that there are certain large projects, such as the redevelopment of a large block of urban property, the building of a large industrial works, or an industrial or housing estate, which have to be planned and carried out over a number of years. In these cases the developer needs to know his financial commitment at an early stage, and the Board will assess the charge provided that (*a*) planning permission, at least in principle, has been obtained; and (*b*) the applicant can show that any necessary preliminary work, such as demolition of existing buildings or the laying of roads or sewers, will be substantially started within four years; and (*c*) the proposed development is in the Board's view likely to be completed in one continuous process. The Board reserve the right to reassess the charge if the development has not been substantially started within four years, that is, unless within that period a reasonable proportion of the total estimated expenditure has been invested on preliminary works such as site preparation and improvements.

County Court Rules Amended

A NUMBER of minor amendments to the County Court Rules, 1936, are made by the County Court (Amendment No. 2) Rules, 1950, and have effect as from 1st January, 1951. Among the changes to which attention may be drawn is the amendment of Ord. 7 by the deletion of the proviso to r. 1 and certain consequential words in r. 6 of that Order; the effect is to revoke the exemption of claims not exceeding £2 from the requirements for filing particulars of claim. Another procedural change concerns originating applications: Ord. 6, r. 4 (2), is amended to enable the applicant or his solicitor to serve a copy of the application on the respondent in the same way as an ordinary summons. Solicitors will also be interested in amendments to Ord. 47, r. 8 (costs where money paid into court), and r. 37 (allowance of costs without taxation), and to the directions in Pt. II of App. D on the amounts to be allowed as fixed costs in respect of judgments.

Ground Leases and the Leasehold Property Bill

A MEMORANDUM on the Leasehold Property Bill, issued by the Royal Institution of Chartered Surveyors, objects to the extension of long leases of dwellings on terms which will give the lessee, at the lessor's expense, up to two years' further enjoyment of the property at a low rent. In many cases, the memorandum states, the lessee will have bought the "fag end" of the lease at an appropriate price, expecting the lease to run out at the predetermined date, while the lessor will have purchased the reversion on similar expectations. In many cases death duties will have been paid, mortgages arranged, and many other transactions entered into on the understanding that the lease will expire on the agreed date. An intermediate lessee occupying part only of the premises, who has let off other parts at rack-rents, will be granted two years' additional income therefrom, to which he seems in no way entitled. It would be more equitable, it is stated, to continue the lease at the fair market rent, which, as a purely temporary measure where better criteria are not available, might be related to the rateable value or Schedule A assessment of the premises.

The Solicitors' Journal

RISING costs of production make necessary the first increase in the price of "THE SOLICITORS' JOURNAL" since January, 1941. For the moment the bulk of readers will not be affected, as the inland subscription rate is unchanged at £3 per annum. From 1st January, 1951, the published price will be increased from 1s. 3d. to 1s. 6d. and the overseas subscription rate from £3 to £3 10s. per annum. It is interesting to recall the changes made in the annual subscription rate. In 1914 it was £1 6s., and rose to £2 12s. in 1918. It was held at that figure until 1941 and, in place of the 100 per cent. increase made necessary by the 1914–18 war, that of 1939–45 saw a much smaller increase from £2 12s. to £3, or 15 per cent.; in spite of the upward trend in costs since 1945 no further increase has taken place. A very considerable rise in the number of readers since 1945 explains the smallness of the increase, but the recent further upward trend in the price of paper and printing costs makes a general rise in the inland subscription rate seem inevitable in the near future. Subscribers can be assured that, if it becomes necessary, it will be kept to the minimum.

Recent Decisions

In *R.* v. *Cohen*, on 18th December (*The Times*, 19th December), the Court of Criminal Appeal (the LORD CHIEF JUSTICE and HILBERY and PARKER, JJ.) held that, where a person was charged with knowingly harbouring uncustomed goods contrary to s. 186 of the Customs Consolidation Act, 1876, with intent to defraud His Majesty of the duties due thereon, once it was proved that he knowingly harboured goods subject to duty, s. 259 of the 1876 Act threw the onus on him of proving that the goods were in fact customed; but if the prosecution merely proved that he was in possession of dutiable goods in such circumstances as to enable an inference to be drawn that he was consciously in possession of them and he failed to prove that the duty had in fact been paid, the onus was on him to give some explanation from which a jury might infer that he did not know that duty had not been paid, as, for instance, that he had bought the goods in the ordinary course of trade.

In *Tinkham* v. *Perry*, on 18th December (*The Times*, 19th December), the Court of Appeal (the MASTER OF THE ROLLS, LORD RADCLIFFE and SINGLETON, L.J.) held that, where a deceased intestate was at the time of his death living apart from his wife but with another woman in a flat of which he was at that time a statutory tenant, the word "widow" in the phrase "where a tenant leaves no widow" in s. 12 (1) (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, referred to a widow living apart from the deceased at the time of his death and not only to one living with him, and therefore the woman living with the deceased statutory tenant was not entitled to succeed him as statutory tenant.

PUBLIC RIGHTS OF WAY

PART IV of the National Parks and Access to the Countryside Act, 1949, is of great importance to all solicitors who number country landowners and farmers among their clients, and to a lesser extent also to those concerned with urban properties.

The heading to this Part of the Act is the same as that to this article, and, although public rights of way do not figure in the short title of the Act, it is one of the two longest Parts, containing thirty-two sections.

The provisions of the Act apply to public rights of way generally and not only to those in the national parks or in areas of outstanding amenity.

Twelve lengthy sections deal with the preparation by county councils of a survey and maps of public footpaths and bridleways. As county councils will normally have until December, 1952, to carry out the survey and prepare a draft map of these rights of way, these sections are not of immediate importance to solicitors other than those who have to advise local authorities. This survey has, however, received considerable publicity this year as a result of Circular No. 81 issued by the Ministry of Town and Country Planning, with which was circulated to local authorities a memorandum prepared by the Commons, Open Spaces and Footpaths Preservation Society in collaboration with the Ramblers' Association on how to carry out the survey. The concern at first felt by landowners and farmers regarding this survey has no doubt now subsided and for present purposes it will suffice to say that very adequate facilities are given to owners to object and dispute rights of way which are alleged to subsist over their land. The object of this article is, however, to discuss matters of more immediate practical importance.

A public carriageway is, of course, a public right of way and the term " highway " normally covers all public rights of way on foot or horseback and with or without animals and vehicles. The only highways or rights of way with which the provisions, except s. 58, we are now discussing are concerned are, however, public footpaths and bridleways, the latter way including a driftway or way for driving animals.

Creation of New Public Rights of Way

Provision is made for the creation of new public rights of way by agreement and by compulsion.

Section 39 gives to county borough, borough and urban and rural district councils power to enter into a " public path agreement " for the dedication by a landowner, on payment or otherwise, of a public footpath or bridleway subject to such limitations or conditions as may be agreed. The Minister of Town and Country Planning, who is the Minister concerned with this Act, may direct, on the application of a county council, that this power may be exercisable by such council. Dedication of a public right of way, subject or not to conditions, e.g., the right to plough, is a unilateral act on the part of an owner and does not require any local authority to be party to it if no payment is made; the only acceptance necessary to complete the creation of the way is public use of it. If, therefore, a rural district council wish to arrange, without the consent of the county council which they have to obtain under the section, for the dedication by an owner of a path, there is no reason why they should not do so if no question of payment arises. Again, a county council need hardly bother to obtain a direction from the Minister. Furthermore, the section in no way derogates from the principles of implied dedication of public rights of way. To a certain extent the section is, therefore, superfluous.

Section 40 contains the compulsory powers. Under it the authorities empowered to enter into public path agreements may make a " public path order " creating a public right of way, if satisfied that it is expedient to do so, having regard to the extent to which the path would add to the convenience of a substantial section of the public or of persons resident in the area and to the effect on persons interested in the land over which the right will run. The order has to be confirmed by the Minister before it is effective.

The procedure on such an order is set out in the First Schedule to the Act. This provides for notice of the order to be advertised in the *London Gazette* and a local newspaper and, unless the Minister otherwise directs, to be served on owners, lessees and occupiers other than tenants for a month or less. Objections may be sent to the Minister, who must hold a local inquiry or afford a private hearing to the objector. If the Minister confirms the order notice of confirmation has to be advertised in the *London Gazette* and a local newspaper, and served on owners, lessees and occupiers as before if, but only if, they have requested it.

No provision is included for registration of an order in any local land charges register, and solicitors submitting forms of inquiries to local authorities should, therefore, add an inquiry as to whether any such order is in force, or the making of one has been approved, affecting the land concerned (cf. pp. 621, 622, *ante*).

Compensation is payable under s. 46 to any person the value of whose interest in land is depreciated by such an order or who suffers damage from disturbance as a consequence of the order where the land owned or occupied is the land over which the right is created or land held therewith. An adjoining owner or occupier is only entitled to compensation if the creation of the way would be actionable at his suit if it had been created otherwise than under statutory powers.

Diversion and Closure

The general statutory provisions relating to the diversion and closure of public rights of way are those contained in the Highway Act, 1835. The procedure there laid down is complicated and costly, involving considerable advertising, the obtaining of a justices' certificate and an application to quarter sessions, and it is full of traps for the unwary. Under this procedure a right of way can only be diverted if the new route is (*a*) shorter or (*b*) more commodious than the old one, and can only be closed without providing a new route if it is unnecessary. Recent Acts, e.g., the Acquisition of Land (Authorisation Procedure) Act, 1946, s. 3, and the Town and Country Planning Act, 1947, s. 49, have provided alternative procedure which can be used in certain cases, and the 1949 Act now provides an alternative general procedure which can be used for footpaths and bridleways. The 1835 Act procedure can still be used if desired. While it may be doubted whether the new procedure will be much quicker, it should be less costly than the old, and there are fewer pitfalls.

Under s. 42 the council of a county borough or borough or urban or rural district may make a " diversion order " if the owner, lessee or occupier of land crossed by a public path satisfies them that it is expedient to divert it *either* for securing the efficient use of the land or of other land held therewith *or* providing a shorter or more commodious path. A rural district council will always, and a borough or urban district council will generally, have to obtain the consent of the county council to the making of an order (s. 44).

It will be seen that the cases in which a path can be diverted have been widened very much. Thus a path or

bridleway crossing a farm might run diagonally across arable fields, but formerly it was practically impossible to do anything about it, except temporarily under the now revoked Defence Regulation 62, for any alternative round the edges of the fields would almost invariably be longer and could not well be laid in tarmac or gravel so as to make it more commodious. Now the efficient use of the land is an alternative ground for a diversion.

The diversion order has to be confirmed by the Minister, who must be satisfied that the new route will not be substantially less convenient to the public. The procedure on a diversion order is similar to that on a public path order, except that in addition notices must be served on any local authorities, other than that making the order, in whose area the land lies, e.g., the parish council, and must be posted at each end of the path.

The council, before making an order, may require the applicant to agree to defray any compensation or expenses which may be incurred in connection with it, including the cost of constructing the new path.

If a county borough or county district council consider that an existing path is not needed for public use they may make an "extinguishment order" extinguishing it (s. 43). This has to be confirmed by the Minister, who must be satisfied that it is expedient to do so, having regard to the extent of user by the public and to the effect of the extinguishment on land served by the path. The procedure is similar to that on a diversion order.

The compensation provisions of s. 46 apply to diversion and extinguishment orders. Thus an owner of land served by a path which was extinguished would be entitled to compensation as the extinguishment would, apart from statute, be illegal and actionable.

The Minister can direct that the powers to make diversion and extinguishment orders should be exercisable by a county council and he may direct a council to make an order.

Agricultural Land

Modern methods of agriculture which bring into cultivation fields for many years pasture, and introduce mechanical equipment for ploughing, have in many cases resulted in the existence of public rights of way becoming unduly burdensome to farmers. Sometimes it will be possible to secure the diversion of the way, but in many cases it may not be possible or necessary. Section 56 of the Act alleviates this burden.

Unless the right to plough up a path was reserved on the dedication of a path an owner could not lawfully plough it. The reservation of such a right was an exception rather than a rule and it cannot be obtained after the original dedication. An owner who ploughs up a path when he has no right to do so is liable to conviction under s. 70 of the Highway Act, 1835, for wilfully destroying the surface of a highway (*Brackenborough* v. *Thorsby* (1869), 19 L.T. (N.S.) 692; *Dennis and Sons, Ltd.* v. *Good* (1919), 83 J.P. 110). Section 56 of the 1949 Act, however, entitles an occupier to plough up any path or bridleway if it crosses agricultural land which it is proposed to plough in accordance with the rules of good husbandry and in the case of which it is convenient to plough the path together with the rest of the land. This is, however, subject to two conditions:—

(1) That the occupier gives at least seven days' notice of intention to plough to the highway authority, i.e., in rural districts to the county council, in other districts to the county borough, borough or urban district council (penalty for default, a fine not exceeding £2; in addition the offender will still be liable to conviction under the 1835 Act also);

(2) That the occupier, as soon as may be after the ploughing is completed, shall make good the surface of the path so as to make it reasonably convenient for the exercise of the public right of way. Some farmers may wish to interpret the phrase "as soon as may be" as meaning at their convenience, i.e., when the field comes to be rolled out in the normal course of agricultural operations. As, however, this might result in the public being inconvenienced for a long time and the Act is one primarily for preserving rights of way, the view of highway authorities will no doubt be that the path must be rolled out separately from the rest of the field as soon as weather conditions allow after ploughing. The penalty for failure to restore is a fine not exceeding £10 and a daily penalty not exceeding £1 for every day the failure continues after conviction.

The Act does not affect the rights of an owner who is entitled to plough up a path apart from it, and he need not, therefore, comply with these conditions.

Once a path has been dedicated it is unlawful to create obstructions such as fences or stiles across it. This has resulted in difficulties for farmers who wish to alter field boundaries or to divide fields up. Section 56 (4) entitles a farmer who wishes to erect stiles, gates or other works as obstacles to animals across a path in the interests of efficient agriculture to apply to the highway authority for permission to do this, and the authority may impose conditions on any permission to avoid undue inconvenience to the public. There is an appeal (s. 56 (5)) to the Minister if the authority refuse permission, or against conditions imposed on a grant of permission.

Deemed Dedication

One final point to be mentioned is an amendment to s. 1 of the Rights of Way Act, 1932. This section provided, *inter alia*, that a way actually enjoyed by the public as of right and without interruption for twenty years should be deemed to have been dedicated as a highway, unless sufficient evidence was produced that there was no intention to dedicate. Where, however, the person in possession of the land was not legally capable of dedicating, the period was forty years. Section 58 of the 1949 Act now applies the twenty-year period to all cases, whether or not the person in possession was capable of dedicating.

R. N. D. H.

Costs

BANKRUPTCY—III

Now that we have considered some of the outstanding legal points in connection with bankruptcy, we may turn our attention to the more practical side.

In the first place, let us consider some of the matters in connection with the taxation of costs in bankruptcy. As we have seen, costs which are to be paid out of the estate of a bankrupt, whether those costs are compiled according to the scale applicable to bankruptcy and set out in the Appendix to the Bankruptcy Rules, 1915, or whether they are made up according to any other rules or regulations, must be taxed by the prescribed officer of the court, and no payments in respect of costs will be allowed in the trustee's accounts without proof that the costs have been so taxed (see s. 83 of the Bankruptcy Act, 1914). Before taxing the bill the taxing officer must satisfy himself that the employment of the solicitor has been properly sanctioned, that is, sanctioned by

the committee of inspection in accordance with s. 56 of the Act. In order that the taxing officer may be satisfied that the proper sanction has been obtained by the trustee to the employment of the solicitor the trustee must produce a copy of the resolution or other authority sanctioning the solicitor's employment and specifying the limit which the costs must not exceed (see r. 109 of the Bankruptcy Rules, 1915).

Before the trustee declares a dividend to be paid out of the estate of the bankrupt he must request the solicitor to lodge his bill for taxation, and if the solicitor fails to do so within seven days after receipt of the request, then the trustee will be entitled to declare and pay a dividend, and thereafter the solicitor will have no right of recovery either against the trustee personally or against the estate (see s. 83 (4) of the Act).

The rules as to the taxation of costs are contained in the General Regulations to Pt. II of the Appendix to the Bankruptcy Rules, 1915. The bills for taxation will be prepared in the same form as any other bills for taxation in the High Court, except that they must be written or typed on draft paper lengthwise instead of being written or typed on foolscap paper. Vouchers for all payments claimed in the bill must be lodged with the bill, and so must the counsel's briefs and other relevant papers.

The section provides that the solicitor's bill shall be taxed by the prescribed officer. In the case of bankruptcy proceedings in the High Court, this means the bankruptcy taxing masters of the Supreme Court, and, in the case of bankruptcy proceedings in the county court, it means the registrar of the county court ; subject to the fact that in any case where a bill of costs to be paid out of the estate of a bankrupt is taxed by a registrar of a county court, then the Board of Trade may require that the bill shall be reviewed by a bankruptcy taxing master of the High Court, and on such a review the Board of Trade is entitled to appear (see r. 116 of the Bankruptcy Rules, 1915).

The same rules apply with regard to the review of taxation of costs in bankruptcy as apply to any other costs taxed in the Supreme Court, so that any person dissatisfied with the allowances made by the taxing master may, at any time before the certificate or allocatur is signed, carry in objections to the taxation in writing, specifying the items to which objection is taken, and the grounds for the objection. When he considers the objections, the taxing master may, if he thinks fit, hear further evidence in relation to those items to which objection is taken. Note here that he is not bound to hear further evidence, so that the solicitor has no right to demand that he shall be heard on the review, nor may he, without the consent of the taxing master, put in any further documents in relation to the items to which he has taken objection. Further, it is only those items to which formal objection has been taken that can be dealt with at any further hearing which the taxing master may be disposed to grant, so that the solicitor cannot raise further objections to items other than those to which he formerly objected in writing.

Moreover, where the solicitor is still dissatisfied with the allowances made by the taxing master, after the formal review of taxation by the taxing master, then he may apply to the judge to review the taxation, provided such application is made within fourteen days after the date of the certificate or allocatur, or such further time as the judge or the taxing master may allow. On the review before the judge, no further evidence may be brought in other than that which was before the taxing master at the time when he reviewed the taxation, unless the judge directs otherwise (see General Regulations, para. 19, Pt. II of the Appendix to the 1915 Rules).

Rule 103 of the Bankruptcy Rules, 1915, provides that in all proceedings under the Act the scale of costs to be applied is the scale provided in the Appendix to the Rules, and we have noticed that where the assets of the estate are estimated to produce less than £300, then the allowances set out in the scale will be reduced to three-fifths thereof. Further, it has been decided that the reduction to three-fifths of the scale applies only to costs covered by the bankruptcy scale, so that any costs for which provision is otherwise made will be compiled according to the regulations governing those costs. For example, if in the course of the winding up of the bankrupt's estate it is necessary to sell property, then the costs will be compiled according to the General Order, 1882, and, moreover, will not be liable to reduction in the case of a small bankruptcy.

Again, para. 1 of the General Regulations contained in Pt. II of the Appendix to the Bankruptcy Rules, 1915, provides that where no provision is made in the scale for any item of costs then the scale set out in Appendix N of the Supreme Court Rules will apply. This direction must, of course, be read as being applicable only to items of costs to which Appendix N applies, so that if a solicitor is instructed by the trustee, with the sanction of the committee of inspection, to perform work to which some other regulation or rule applies, so far as the costs are concerned, then the costs in connection with that work will be made up according to the regulation or rule applicable. For example, it may be necessary in the course of the winding up for the trustee to enter into a contract or agreement, and the costs in connection with this, being non-contentious, would be compiled according to Schedule II of the General Order, 1882. Rule 103 (3) of the Bankruptcy Rules, 1915, provides that the items in the scale of costs contained in the Appendix to the Rules shall be increased by 50 per cent. in respect of work done on or after the 10th March, 1944.

It is significant to notice here that it was decided in the case of *Re Lavey* [1921] 1 K.B. 344, that a taxation of costs under the Bankruptcy Rules should proceed on the basis that the costs are payable out of a common fund, so that they will not be taxed as between solicitor and own client. The distinction between the various bases of taxation is succinctly described in the case of *Giles* v. *Randall* (1914), 59 Sol. J. 131. It follows, therefore, that the taxation will not be on such generous lines as in the case of a taxation of a solicitor and own client bill, notwithstanding that the solicitor is, in fact, instructed by the trustee who is his client.

One other point in this connection must be noticed, namely, that in taxations under the Bankruptcy Rules there is no counterpart of R.S.C., Ord. 65, r. 27 (38B). This rule, it will be remembered, provides that if on the taxation of a bill of costs payable out of a fund or estate (real or personal), or out of the assets of a company in liquidation, the amount of the professional charges and disbursements contained in the bill is reduced by a sixth part, no costs shall be allowed to the solicitor leaving the bill for taxation for drawing and copying it, nor for attending the taxation. In some respects a taxation under the bankruptcy rules must be regarded as a taxation of costs which are payable out of a common fund (see *Re Lavey*, *supra*), but so far as the one-sixth rule is concerned the similarity does not exist, with the result that, although more than one-sixth of the bill may be taxed off, the solicitor will not be required to pay for the costs of the taxation (see *Ex parte Marsh* (1885), 15 Q.B.D. 340).

The principle applies, however, only to the case where the solicitor whose bill is concerned is the solicitor to the trustee of the bankrupt. Where, on the other hand, the trustee is

taxing the bill of the solicitor for another party whose costs are payable out of the estate, as in the case where he is taxing the bill of a mortgagee's solicitor, then the rule will apply (see *Re Allingham* (1886), 32 Ch. D. 36) so that if, in addition to the scale charges allowed under the General Order, 1882, the solicitor to the mortgagee is seeking to recover additional fees or disbursements, which on taxation are disallowed by the taxing officer, then the one-sixth rule will apply, and if more than one-sixth of the total of the bill, including the disbursements, is disallowed, then the solicitor whose bill is being taxed will have to bear the costs of the taxation himself.

One final point with regard to the rules. Where there are two or more petitions against the debtor, only the costs of that petition on which the receiving order is made will receive priority in a distribution of the estate (see *Ex parte Page* (1871), 25 L.T. 716). The costs of the other petitioning creditors will not be allowed at all, in the absence of an order of the court.

J. L. R. R.

A Conveyancer's Diary

GENERAL WORDS

CAREFUL consideration of the decision in *Goldberg* v. *Edwards* [1950] Ch. 247 reveals some of the difficulties, not often thought of, in s. 62 of the Law of Property Act, 1925. This is the section, replacing a similar section in the Conveyancing Act, 1881, which makes it unnecessary for the draftsman to insert general words in a conveyance by implying them for him.

The facts of this case can be considerably simplified for the purpose of showing the effect of the decision on the questions of law which came up for determination. In January, 1947, an oral agreement was made between the parties whereby the defendant, who was the owner of premises consisting of a house with an annexe built behind it, and who was then herself in occupation of the house, agreed to let the annexe to the plaintiffs for a term of years. In the course of the negotiations which led up to this agreement, as the Vice-Chancellor of the Duchy of Lancaster found at the trial, the defendant agreed to give certain privileges to the plaintiffs. The annexe was reached from the street either by a passage in the open air round the side and back of the house, or through the front door of the house and by a covered passage leading from the back of the house direct to the annexe, the latter mode of approach being both shorter and more convenient. The privileges which, as the Vice-Chancellor found, the defendant had agreed to give to the plaintiffs concerned for the most part the approach to the annexe from the street, and were of two different kinds. Firstly, the defendant had agreed to give the plaintiffs what was described by the Vice-Chancellor as the " personal " privilege of coming and going to and from the annexe through the front door of the house, this being described as a personal privilege because it was held not to extend to the plaintiffs' servants or workmen, or any other persons except the two plaintiffs themselves. Secondly, the defendant agreed to give the plaintiffs certain other privileges, of which one only need be instanced here—the privilege of admitting visitors to the annexe through the front door.

The necessity of keeping these two privileges distinct is due to the fact that the Vice-Chancellor found that the first privilege (the " personal " privilege) had been granted with the intention that it should be enjoyed by the plaintiffs *qua* lessees during the term of the demise, but that the other privileges (which, it may be said in passing, although nothing turned on the point, had been granted after the " personal " privilege had been agreed on and after the plaintiffs had taken possession) had been granted subject to the express limitation that they were to be enjoyed only while the defendant continued to occupy the house.

Almost immediately after the agreement reached in January, 1947, the plaintiffs went into possession of the annexe, but it was not until July, 1947, that the defendant granted a lease to the plaintiffs. By this lease the defendant demised to the plaintiffs the annexe " with the appurtenances " for a term of two years, subsequently extended by exercise of a lessees' option for another two years, from the date when the plaintiffs took possession of the annexe. In January, 1949, the defendant agreed to let the house to the second defendant, who having gone into possession obstructed the passage leading from the front door of the house to the annexe, and prevented the plaintiffs from using this means of access to their premises. The plaintiffs thereupon brought this action, in which they asked for an injunction to restrain the defendants from obstructing the entrance of the plaintiffs, their servants and persons authorised by them, from the street to the annexe by the front door of the house. This action was dismissed by the Vice-Chancellor, and the plaintiffs appealed.

The plaintiffs' case was put in two ways. First, they claimed an easement to use the front door of the house on the ground of implied grant. This claim was completely unsuccessful, and no more need be said of this part of the case here. Secondly, they claimed that the rights in question had passed to them on the demise of the premises as rights appurtenant to these premises by virtue of s. 62 (2) of the Law of Property Act, 1925, the relevant parts of which read as follows:—

> " A conveyance of land having houses . . . thereon shall be deemed to include and shall by virtue of this Act operate to convey, with the land . . . all . . . ways, passages, lights, watercourses, liberties, privileges, easements, rights and advantages whatsoever appertaining or reputed to appertain to the land . . . conveyed . . . or, at the time of conveyance, demised, occupied, or enjoyed with . . . or appurtenant to . . . the land. . . . "

The Court of Appeal, having disposed of the plaintiffs' claim based on an implied grant, dealt with the claim based on s. 62 under two heads. First, they considered the rights other than the personal right (of which the example referred to above was the right to use the front door approach for visitors to the annexe), and on this the decision of the court (in the words of the Master of the Rolls, who delivered the principal judgment) was as follows: " [This was a privilege which the defendant] herself allowed so long as she was there, because it did not interfere with her own affairs and business. It was clear that she was not making that privilege any part of the bargain between herself and the tenants of the annexe. It is plain, in my view, that these rights, other than the plaintiffs' personal right of passage, were not within the language of s. 62 so as to be covered by the demise to them."

This part of the decision, with all respect, is far from clear. It consists, when examined, of two distinct matters: a finding of fact (that the privilege had not been made part of the bargain) of the court below, approved by the Court of Appeal, and a decision on a point of construction (that these

rights were not within the language of s. 62). As to the latter, the language of the section is wide enough, at first glance, to include any right which at the time of the conveyance (i.e., for this purpose the grant of the lease to the plaintiffs in July, 1947) was enjoyed with the land. This language seems to require nothing more than a factual test for determining its applicability or otherwise to any given right or privilege, and there is nothing in the facts of the present case to suggest that the " non-personal " rights enjoyed by the plaintiffs with the lease of the defendant were not in fact enjoyed at the material time. It is true that these rights were not given to the plaintiffs at the time of their original negotiations with the defendant, nor as part of the oral agreement which the parties reached in January, 1947, but later, during the period when the plaintiffs were in possession pending the grant of a formal lease, and to that extent may truly be said not to have formed part of the bargain (i.e., the original bargain) between the parties ; but if the factual test is the correct test, in certain circumstances, this is not a material consideration.

From the point of view of settling the dispute between the parties this was not, perhaps, a point of any substance, for even assuming that the " non-personal " rights had passed as part of the demise under or by virtue of s. 62, that section could not have affected the construction to be put upon these rights so as to enlarge (or diminish) them ; and if, as was found as a fact, the rights in question had been granted for a limited period (i.e., the period of the first defendant's occupation of the house), then even if the rights had passed to the plaintiffs, they had expired when the first defendant gave up occupation of the house to the second defendant. But this does not affect the difficulty to which I have referred above, which is that of reconciling the apparently very rich language of s. 62 with the bald decision on construction that the " non-personal " rights in this case " were not within the language of s. 62 so as to be covered by the demise " to the plaintiffs.

As regards the " personal right," the Court of Appeal held that this was a right or easement of a kind covered by s. 62 (deriving assistance from the decision in *Wright* v. *Macadam* [1949] 2 K.B. 744 on this point), and that, provided it had been enjoyed " at the time of the conveyance," it had passed to the plaintiffs by virtue of s. 62. This reasoning involved consideration of the question whether the " time of the conveyance " in this case was the date of the grant of the lease in July, 1947, or the date when it commenced to run in January, 1947. The latter was the date suggested by the defendants, and if it had been accepted the plaintiffs' case would have been bound to fail, as they only went into occupation on that date and there could therefore have been no question, so far as they were concerned, of any right being enjoyed by them, or of any easements being appurtenant to the premises, at that date. But the Court of Appeal held that " the time of the conveyance " for the purposes of s. 62 was the date on which the lease was granted, and to this extent the plaintiffs succeeded. The decision of the court was that there had thus passed to the plaintiffs, by virtue of s. 62, on the demise of the annexe to them the right to use the front door of the house, this right being limited to use by themselves, and not by their servants or any other persons.

It will have been seen that no reference was made to the meaningless reference to " appurtenances " in the lease. This reference was completely at variance with the terms of the contract between the parties, which showed that a right was to be granted *de novo* to the plaintiffs, but that there was then nothing in the nature of an easement appurtenant to the premises which could be included in the demise as an " appurtenance." The expression " appurtenances " has a strict meaning and its use in a contract may have serious effects on the operation of s. 62 on the conveyance which follows the contract (see, e.g., *Re Peck and London School Board's Contract* [1893] 2 Ch. 315), but in a conveyance the words are now meaningless, having regard to s. 62. Draftsmen who prefer succinctness of expression to a blind acceptance of old forms have long ago discarded this obsolete and sometimes confusing appendage to a description of property.

" A B C "

Landlord and Tenant Notebook

PREMISES LET TOGETHER WITH A DWELLING-HOUSE

" A hat makes all the difference " runs an advertisement to be seen on many a London omnibus ; the accompanying illustration shows that the draftsman had not in mind the recent mirth-provoking incident in the House of Commons, when a lady member's headgear was passed successively to, and worn by, two male members so that they might comply with the requirements of certain Standing Orders. What the advertisement implies might be expressed by the statement " a woman wearing a hat is not the same woman as that woman not wearing a hat." It is just conceivable that those responsible, whose aim is apparently to promote the interests of the millinery trade, would admit, under cross-examination, that there might be occasions when no difference was made, and also some on which the difference was not what was intended. While at first sight the new decision in *Langford Property Co., Ltd.* v. *Batten* [1950] 2 All E.R. 1079 ; 94 SOL. J. 821 (H.L.) invites an analogy : " a garage makes all the difference to the standard rent of a dwelling-house," it is well to start with the warning that that proposition would be wider than the authority warrants.

The appellants in the recent case, whose determination to find out what the many obscure provisions of the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, mean is well known and greatly admired, issued a summons in Croydon County Court to determine the standard rent of premises comprising a flat and garage let by them to the respondent in 1946 at a rent of £185 a year. On 1st September, 1939, the flat had been let at £135 a year to someone else, without the garage, which was then let at £13 a year. The annual rateable value of the flat, at that time at all events, was £56, that of the garage £6 ; the respective areas were 600–700 sq. ft. and 140–150 sq. ft. ; the properties were not contiguous, but not far apart. When the appellants granted the tenancy to the respondent (soon after the 1939 tenant had left) the agreement contained a clause providing that the " said premises " were " entire and indivisible."

After carefully reviewing the authorities, the county court judge came to the conclusion that when s. 3 (3) of the Rent etc., Restrictions Act, 1939, was applied the result was that premises had been let together with a dwelling-house, and must therefore be treated as part of the dwelling-house ; or, as His Honour put it, that the garage was notionally part of the flat ; that consequently the accession could not alter the standard rent fixed by the old tenancy. The Court of

Appeal agreed with this; the House of Lords (by a four to one majority) disagreed.

If one had to indicate briefly where and why and how the disagreement came about, it might be said that the majority of the House of Lords were with the judge of first instance up to the conclusion, and there the ways parted. That is to say, they appeared to have shared the county court judge's view that premises had been let together with a dwelling-house, and that the garage must be treated as part of the dwelling-house; but it did not follow, according to them, that the dwelling-house was the same dwelling-house as that let to someone else in 1939.

The subsection says ". . . for the purposes of the Rent and Mortgage Interest Restrictions Acts, 1920–1938, as amended by this section, any land or premises let together with a dwelling-house shall . . . be treated as part of the dwelling-house"; but, as Lord Porter put it, "if, however, a house of a less value than the prescribed limit is let alone, and afterwards possession is recovered and the house is subsequently let with the addition of a piece of land of substantial rateable value, it does not follow that it remains the same dwelling-house, even though the rateable value of house and land is less than £75 . . . Land let with the dwelling-house, it is true, must be treated as part of the dwelling-house with which it is let, but this does not mean that a house and land are the same thing as the house without the land." This, I believe, gives us the gist of the decision. Other passages which may be usefully cited are the following, occurring in Lord Oaksey's speech: "The dwelling-house, the standard rent of which has to be determined in the present case, therefore, included not only the flat but the garage, and the question is: When was that dwelling-house first let? To that there can, in my opinion, be only one answer, that it was first let on 16th January, 1946 . . . I think that it may very well be that it is a question of fact whether the dwelling-houses let are, in fact, different. In the present case the learned county court judge appears to have found as a fact that the two were different, and, in my opinion, he could not have found anything else on the evidence."

The above indicate not only the principle but its scope; Lord Porter's "substantial" in the expression "land or substantial rateable value," and Lord Oaksey's insistence on the fact of difference, serve to warn those who might draw unwarranted conclusions all too hastily. The county court judge had indeed appended to his determination a finding that the inclusion of the garage did not represent a trifling accession to the flat. "Trifling" is, like "substantial," a relative term; and anyone who takes the trouble will find numerous adjectives and adverbs of a like nature on every page, the significance of their use being obvious: "small," "trivial," "merely" are among them. "It would be all wrong," Lord Radcliffe puts it, "to deduce a change of identity from some unimportant variation in the content of the tenancy. For the question is not so much whether the premises are in all respects the same as whether the dwelling-house now in question is the same dwelling-house as before. Trivial variations—a few feet here or there—ought not to be treated as causing a change."

It follows that the question whether a new entity has been created by addition to the subject-matter is likely to prove a difficult one in some cases, and I do not think that it is one which can be decided by merely comparing areas or annual values. The attempt made in *Palser* v. *Grinling* [1946] K.B. 631 (C.A.) (pp. 640–641) to re-express "substantial portion" (of the whole rent) as "in the absence of special circumstances, 20 per cent. . . any portion under 15 per cent. would not be a substantial portion, and any portion from 15 per cent. up to 20 per cent. would be a 'border line' case" was promptly discouraged by the House of Lords ([1948] A.C. 291) as an attempt to usurp the functions of the Legislature. In the case of change of identity by including more than was previously let (or by excluding some part formerly demised) there is, Lord Radcliffe observed in the recent case, no pointer as to what is intended by the Acts, as there is in the case of improvements on the ground of which rent may be increased; the gap has had to be filled up by judicial interpretation. But there was no suggestion that mere mensuration could fill in that gap; quality is bound, I submit, to be a relevant consideration. If I may revert to my opening observations, I would make the point in this way: no one would suggest that any hat would enhance the appearance of any woman; and, indeed, amount of material or cubic capacity could have little to do with the question.

The county court summons in *Langford Property Co., Ltd.* v. *Batten* was decided on 4th March, 1949, less than three months before the Landlord and Tenant (Rent Control) Act, 1949, was enacted. Lord Goddard, who was the dissentient, based his approval of the decisions of the court below on the view that the transaction was just the sort of thing that the subsection had anticipated, i.e., that a landlord might induce a prospective tenant to take, with the dwelling-house, something for which he had neither use nor desire, and thus extricate the house from the operation of the Acts. Lord Radcliffe concluded his speech by reminding us that the 1949 statute might enable a tenant to obtain a reduction if that did happen. This is, of course, the case; but it will mean that rent tribunals will be called upon to play their part in filling the gap mentioned by his lordship earlier in his speech—for it is only when the standard rent of a dwelling-house is the rent at which it was let on a letting beginning after the 1st September, 1939 (or is ascertainable by apportionment by reference to such), that these tribunals have jurisdiction. So if a tenant, without testing the matter in a county court, agrees that his dwelling is a new entity, landlord and tribunal may be somewhat embarrassed.

R. B.

PRACTICAL CONVEYANCING—XXIV

Covenants to Construct Roads

Where a builder agrees to construct the roads adjoining houses or other buildings but does not do so before completion it is important that a purchaser from him should have a clear covenant defining the builder's obligations. The wording of such covenants was discussed *ante* (94 Sol. J. 24, 25), where it was suggested that the standard of the work should be specified as being such that the local authority would take the road over.

It may be, however, that even if a covenant is not worded in this way there may be an implication that the same standard of work must be done by the builder. In *Ireland* v *Moss, Estates Gazette*, 9th December, 1950, p. 423, the builder, in the conveyance to a purchaser in 1938, covenanted to make up a road and to use his best endeavours to cause the repair and maintenance of it to be undertaken by the local authority. The road was made in 1938 but in a manner which would not have been approved by any local authority. About 1946 the

local authority made up the road to their requirements and took it over, a charge of £31 falling on the purchaser. The Court of Appeal decided that the purchaser was entitled to recover £25 damages for breach of covenant and Somervell, L.J., said: "I think that the paragraph in the conveyance meant that the method of construction of the road was of a type which was approved by the local authority when they took over a road. On the [county court judge's] finding this was not a road of a character which the local authority would have taken over without reconstruction."

This decision is useful because it indicates a line of argument which can be taken on behalf of a purchaser of a house who is required to pay road charges to the local authority. Nevertheless, it must not be assumed that it applies to every covenant to make up roads. In this particular case the covenant went further and required the builder to use his best endeavours to cause the maintenance to be undertaken by the local authority. It appears doubtful whether the standard required by the local authority would have provided the test for the performance of the covenant if it had not contained this further term. Nevertheless, an undertaking, such as is often given, that a house will be "free from road charges" might give rise to a similar implication, as subsequent purchasers will be freed from such charges only if the standard of the road satisfies the local authority.

J. G. S.

HERE AND THERE

DIED A CHANCELLOR

IT is not without a becoming diffidence and a modest reluctance that anyone, however exalted his position, would venture to correct the Lord High Chancellor. How much the more shyly, then, do I pipe up all unbidden to remark that (as reported and, of course, perhaps incorrectly reported) he is represented to have said in the course of the debate on the new pensions scheme for the judges that it was a long time since a Lord Chancellor had died in harness, "certainly not within the last hundred years." Now in point of fact that astonishing old Scot, Lord Campbell, who became Lord Chancellor at the age of seventy-seven, did die in harness in 1861. He might easily have gone one better and actually died in court, for he suffered no illness, gave no intimation of any indisposition. He had sat in court, attended a Cabinet meeting, worked on a reserved judgment, entertained a few friends to dinner, made an appointment for a future meeting and retired to his bedroom. Next morning he was found dead in his chair. Serjeant Ballantine has left on record: "The last time I saw him was on the afternoon of the day preceding his death . . . He was walking sturdily towards his own residence in apparently perfect health and vigour and, although he had attained an advanced age, the news of his death occasioned universal astonishment. I had not heard that he had exhibited any failure of power or diminution of intellect . . . and certainly to the last he exhibited untiring industry."

STRIKE OF LAWYERS

ANOTHER observation of the Lord Chancellor concerned the legal profession as a trade union. "We have not," he said, "had a strike in the legal profession since the days of Christopher Hatton in the time of Elizabeth. My recollection is there were so many blacklegs after the strike started that it broke down almost at once." That's pretty well what happened. The trouble was (to continue in industrialist jargon) that Hatton was regarded as a non-union man and the principle at stake was the closed shop. But there was certainly a strike later than that and, curiously enough, in aid of the same sacred doctrine, when Sir Francis North, afterwards Lord Keeper Guilford, was Chief Justice of the Common Pleas, where the serjeants had a monopoly of the right of audience. Breaking through this custom, he allowed his brother Roger, though not a serjeant, to make certain motions. By way of protest they organised a "dumb day," refusing to bring forward any business, but the Chief Justice was an accomplished strike breaker and intimated that he would hear juniors, attorneys or even the parties so that there might not be a failure of justice. This split the strikers and the upshot was that in the afternoon they waited on North to apologise. He insisted, however, on a public apology in open court on the following morning. They tamely submitted and "the Chief first and then the next in order gave them a formal chiding with acrimony enough, the which, with dejected countenances, they were bound to hear. When this discipline was over the Chief pointed to one to move, which he did more like one crying than speaking." This, so far as I remember, was about 1675.

SCOTLAND AND IRELAND

ONLY a few years earlier there had been an advocates' strike in Scotland, which lasted rather longer but eventually broke down through blackleg trouble. The Irish Bar have been far more ready to resort to strike action than the English, generally over what I believe is called, in trade union circles, "victimisation." For example, Lord Clonmel, who was Chief Justice towards the end of the eighteenth century, got into trouble over a piece of gross rudeness to a member of the Bar. The other barristers threatened to refuse to sign any pleadings or hold any briefs until a public apology had been given. The judge yielded and published in the newspapers an ample apology, but ante-dated, as though it had been a voluntary gesture. From the evidence of the late Maurice Healy, K.C., it seems as if, at any rate up to the first world war, the Irish Bar were always ready to brandish the strike weapon over the heads of judges so inured to it that they apologised not only amply but gracefully. There was Dodd, J., who had unguardedly used words which on their face were grossly offensive to a junior of the Munster Circuit. At the luncheon adjournment the Bar passed a resolution calling on him to apologise in open court under penalty of finding no counsel willing to appear before him. The judge immediately made full amends in a crowded court. Then there were Lord Chancellor O'Brien and Lord Justice Ronan, who interrupted counsel so continuously that more than once deputations from the Bar warned them that soon counsel would refuse to appear before them in the Court of Appeal. This was effective in that it always evoked expressions of contrition coupled with a firm purpose of amendment, but the improvement would persist for just about a week before the babble broke out again. It is interesting to note that whereas the lawyers are often spoken of as a powerful trade union, they have shown singularly little tenacity in getting the standard rates of pay increased, while the average trade union seems to treat this as its chief concern.

RICHARD ROE.

The Queen of the Netherlands was graciously pleased to bestow the Award of Chevalier of the Orange-Nassau on Councillor Miss Eileen Greenwood, J.P., Mayor of Bermondsey, on the occasion of Her Majesty's visit, accompanied by her hostess, the Queen, to the "Times and Talents" Settlement on 23rd November. Miss Greenwood has been for several years on the staff of Messrs. Kenneth Brown, Baker, Baker.

A double taxation convention between the United Kingdom and France was signed in Paris on 14th December. The convention, which is subject to ratification, provides for avoidance of double taxation on income and profits and is expressed to take effect in the United Kingdom from 6th April, 1950. It is in general similar to those already made with the United States of America, certain Commonwealth countries, the Netherlands, Sweden, Denmark and Burma.

NOTES OF CASES

COURT OF APPEAL

PROCEDURE: PART OF SUM CLAIMED ADMITTED OWING: PAYMENT IN

Lancashire Welders, Ltd. *v.* Harland & Wolff, Ltd.

Cohen, Singleton and Birkett, L.JJ.
7th November, 1950

Appeal from McNair, J., in chambers.

The plaintiffs claimed from the defendants by specially endorsed writ £31,658, as the balance of money due for work done. Before the writ was issued the defendants offered to pay £1,695 if it were accepted in full satisfaction. The plaintiffs declined the offer on those terms and applied for summary judgment under R.S.C., Ord. 14. The defendants, having been given leave to defend, by their defence admitted owing the plaintiffs £1,757, and paid that sum into court, contending that they had a good defence as to the balance. The plaintiffs then applied to a district registrar for judgment for £1,757 under R.S.C., Ord. 32, r. 6. The registrar refused the application, and McNair, J., upheld him. The plaintiffs appealed, relying on *Contract Discount Corporation, Ltd.* v. *Overlyne Trading Co., Ltd.*, not reported, the judgments in which are recorded only in a note taken by the late H. G. Robertson of counsel, from which it appears that Somervell, L.J., there said that, although the court did not interfere with a discretionary order unless the judge had gone wrong in principle, yet, where a defendant admitted in his pleading that the plaintiff was entitled to £485, the issue being only as to the balance, *prima facie* it was not just that the plaintiff should either stand out of the money or be put to the condition of taking it out of court on abandoning the balance. It was contended for the defendants that it would be unfair to deprive the defendants of the advantage of their payment into court which would enable them to recover judgment if nothing further were found to be due to the plaintiffs beyond the amount paid into court.

COHEN, L.J., said that *prima facie*, though they had not heard the full facts, the order made on the application for summary judgment under Ord. 14 was not in accordance with the accepted practice where part of the claim was admitted (see the Annual Practice, 1949, p. 201*n*). If the court were to allow this order to stand depriving the plaintiffs of the use of the £1,757, admitted to be theirs, it would be inflicting an injustice on them (see *Evans* v. *Bartlam* [1937] A.C. 473). It would not be interfering with any of the principles applicable to discretion cases if it reversed the order of McNair, J., and allowed the plaintiffs to enter judgment for the sum which the defendants had admitted that they owed them.

SINGLETON and BIRKETT, L.JJ., concurred. Appeal allowed.

APPEARANCES: *M. Lyell and S. K. de Ferrars* (*Sidney Pearlman*, for *Alsop, Stevens & Co.*, Liverpool); *S. O. Olson* (*Hill, Dickinson & Co.*).

[Reported by R. C CALBURN, Esq., Barrister-at-Law.]

COMPANY: MINORITY: RESOLUTIONS IMPEACHED AS NOT BEING BONA FIDE

Greenhalgh *v.* Arderne Cinemas, Ltd., and Others

Eversheed, M.R., Asquith and Jenkins, L.JJ.
10th November, 1950

Appeal from Roxburgh, J.

The articles of a private company provided, in the regulation dealing with the restriction of the transfer of shares, that no shares should be transferred to an outsider so long as a member was willing to purchase them at a fair value to be ascertained in accordance with the regulations, and, in the event of a purchaser not being found amongst the members of the company, that the selling member might sell to an outsider, but a power was reserved to the directors to refuse their consent to the transfer. The shareholder controlling the majority of ordinary shares, who at the same time was the chairman of the company, entered into an agreement with a purchaser who was not a shareholder, to sell him the controlling interest in the company; the price agreed by the purchaser to be paid for the shares was 6s. per 2s. share, and the agreement provided that the company, after the control had passed to the purchaser, would pay the seller £5,000 as compensation for loss of office. The agreement was carried out in the following manner: A special resolution was passed amending the article dealing with the transfer of shares; the amendment provided that "notwithstanding the foregoing provisions of this article any member may with the sanction of an ordinary resolution passed at any general meeting . . . transfer his shares . . . to any person named in such resolution as the proposed transferee, and the directors shall be bound to register any transfer which has been so sanctioned." By virtue of this regulation, the company, by an ordinary resolution passed later, agreed to the transfer of the seller's shares to the buyer; the seller, who transferred to the buyer certain nominee interests holding shares in the company, thereby enabled him to assume control of the company. The plaintiff, a minority shareholder, complained, *inter alia*, that the special resolution amending the articles, and the ordinary resolution sanctioning the transfer of shares were void as constituting a fraud on the minority. Roxburgh, J., dismissed the action.

EVERSHED, M.R., said that he felt no hesitation in holding that the real transaction was that the £5,000 was part of the purchase price which the purchaser was to pay for the passing of the control, but he (the learned judge) did not think it followed that if this was part of the purchase price for the passing of the control it would, therefore, be a fraud on a dissentient minority because it was contemplated that that part of the purchase price would come out of the assets of the company. But even if the agreements could, for the technical reasons stated, be regarded as agreements to commit a fraud on the minority, it did not follow that the passing of the special resolution altering the articles failed for the same reason. A special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders so as to give to the former an advantage of which the latter were deprived. It was not necessary to require that persons voting for a special resolution should, so to speak, dissociate themselves altogether from the prospect of personal benefit and consider whether the proposal was for the benefit of the company as a going concern. If, as commonly happened, an outside person made an offer to buy all the shares, *prima facie*, if the corporators thought it was a fair offer and voted in favour of the resolution, it was no ground for impeaching the resolution because they were considering the position of themselves as individual persons.

ASQUITH and JENKINS, L.JJ., concurred. Appeal dismissed.

APPEARANCES: *Raymond Jennings*, K.C., and *Lindner* (*S. A. Bailey & Co.*); *Harold Christie*, K.C., and *Hillaby* (*Billinghurst, Wood & Pope* for *Keenlyside & Forster*, Newcastle); *Pennycuick*, K.C., and *E. Blanshard Stamp* (*Pritchard, Englefield & Co.*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

CHANCERY DIVISION

COMPANIES: ALTERNATIVE REMEDY: FORM OF RELIEF

***In re* Antigen Laboratories, Ltd.**

Roxburgh, J. 14th November, 1950

Petition.

This was a petition by a shareholder under s. 210 of the Companies Act, 1948. The petitioner alleged that the

affairs of the company were conducted in a manner oppressive to himself and that the other requirements of the section were satisfied, and asked (1) that an order be made for regulating the conduct of the company's affairs in future; or (2) that such other order whether directing investigation into the company's affairs or otherwise might be made as should be just.

ROXBURGH, J., said that from the prayer of the petition as presented it was impossible to know what the petitioner wanted. A petitioner seeking relief under s. 210 ought to state in clear terms, in the prayer, the general nature of the relief sought, whether it be by the appointment of a director or whatever else it might be. The prayer had not to set out as much detail as the court would require on the drawing up of the order, but it must contain enough to leave no doubt what the petitioner thought that the court ought to do, and the petitioner must himself take the responsibility of stating specifically what he wanted. The specimen form 5A in the Companies (Winding-Up) Rules, 1949, pointed in that direction.

The learned judge gave leave to amend the petition and to apply to appoint a day for the hearing of the petition.

APPEARANCES: *Salt*, K.C., and *Edward L. Gardner* (*Alexander Pollock*); *Raymond Walton* (*Stannard, Bosanquet and Michaelson*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

SETTLED LAND: APPLICATION OF CAPITAL MONEYS: IMPROVEMENT RENT CHARGES: TITHE ANNUITIES

In re Sandbach, deceased

Vaisey, J. 23rd November, 1950

Adjourned summons.

A tenant for life of a settled estate had paid in the past (1) instalments comprising interest and capital of certain improvement loans charged on the estate by order of the Board of Agriculture and Fisheries, and (2) tithe annuities charged on the estate by virtue of s. 4 of the Tithe Act, 1918. The court was asked to determine whether the tenant for life was entitled to recover the capital components of the payments made from the capital money of the settlement, by virtue of the Settled Land Act, 1925, s. 73 (1) (xiii) and (xvi).

VAISEY, J., said that, as regards the first claim, s. 73 (1) (xiii) was intended to replace s. 1 of the Settled Land Act (Amendment) Act, 1887. There was, however, a vital difference between the two Acts; that of 1887 referred to money expended in redeeming "or otherwise providing for the payment" of the rent charge, while the Act of 1925 referred to redemption only. "Redemption," in the present context, referred to a compounding of future payments, not to the payment of periodical sums as they became due. As regards the second claim, the Settled Land Act, 1925, s. 73 (1) (xvi) authorised the application of capital money of the settlement "in the discharge" of a tithe annuity under the Tithe Act, 1918, s. 4. "Discharge," in this connection, appeared to mean the commuting of the annuity for a lump sum, but not the making of payments as they fell due. Consequently, the application failed on both points.

APPEARANCES: *L. M. Jopling*; *F. B. Marsh*; *V. M. Pennington* (*Gregory, Rowcliffe & Co.*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

INCOME TAX: MANAGING DIRECTOR'S ACTIVITIES ABROAD

Goodwin *v.* Brewster (Inspector of Taxes)

Danckwerts, J. 23rd November, 1950

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The appellant taxpayer was appointed a director of a limited oil company at £200 a year and managing director for seven years at £3,000 a year. His service agreement provided that he should have the general management of the company subject to the control of the board. The head office of the company was in London, and the oilfields were in Trinidad. In 1939 the taxpayer went there with his family. Owing to the war he could not return before 1944. He appointed a substitute director to act for him while he was abroad. He was assessed for income tax under Sched. E to the Income Tax Act, 1918, for each of the three years 1941–42, 1942–43 and 1943–44 in the sum of £3,200. He appealed in respect of the £3,000, contending that his directorship and managing directorship were separate offices; that during the material years he did not exercise the office of managing director in the United Kingdom; and that he was therefore not subject to tax under Sched. E in respect of that office. The Special Commissioners decided that he held one office, not two, and, following *McMillan* v. *Guest* (1942), 24 Tax Cas. 190, that he was assessable in respect of his combined salaries.

DANCKWERTS, J., said that the question whether the taxpayer held two offices was to be determined according to the company's articles of association and the service agreement. He had come to the conclusion that this taxpayer held two offices. The next question was whether the office of managing director was one which he held within the United Kingdom. The duties of the managing director under the agreement were the management of the company's business as a whole. Although he was in Trinidad during the material years and was not in a position to exercise the functions of management in London, there was no evidence to support the view that there was any agreement between the taxpayer and the company modifying the terms of the service agreement so as to confine his management to Trinidad. The taxpayer was still the general manager of the business at all material times; and as the control of the company was exercised, and the head office was situated in London, he must have held the office of managing director in London. The decision of the Special Commissioners could be upheld on that ground, even if it could not be upheld on the basis that the taxpayer held only one office. The appeal must be dismissed. Appeal dismissed.

APPEARANCES: *N. E. Mustoe* (*Cole & Matthews*); *Heyworth Talbot*, K.C., and *R. P. Hills* (*Solicitor of Inland Revenue*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

REVENUE: ESTATE DUTY: "PERSONS" EXEMPT: BENEFICIARIES DOMICILED ABROAD

In re Smith, deceased; Executor Trust & Agency of South Australia, Ltd. *v.* Inland Revenue Commissioners

Danckwerts, J. 13th December, 1950

Summons.

By the will of a testator who died in 1915 and by certain settlements certain funds were vested for life in a person resident in England, who died in 1946. On her death realty vested absolutely in a number of beneficiaries, some of whom were, for the purposes of the summons, admitted not to be domiciled or ordinarily resident in the United Kingdom. The funds in question were invested in 3½ per cent. War Loan, 1952, and 4 per cent. Funding Loan, 1960-90, which were stocks issued in accordance with powers given to the Treasury to issue stocks which, in certain conditions, should be exempt from taxation. The question for decision was whether estate duty was leviable in respect of the sums passing to the beneficiaries resident abroad. By s. 47 of the Finance (No. 2) Act, 1915: "The Treasury may . . . issue any securities . . . with a condition that neither the capital nor the interest thereof shall be liable to any taxation, present or future, so long as it is shown . . . that the securities are in the beneficial ownership of persons who are neither domiciled nor ordinarily resident in the United Kingdom . . ." Section 27 (1) of the Finance (No. 2) Act, 1931, contained a similar provision.

The summons was taken out for determination of the question of the incidence of estate duty in respect of those funds. It was contended for the plaintiffs that the " persons " referred to in the Acts must be the beneficiaries to whom the funds passed on the death of the life-tenant, though the official view, as stated in the text books, was that " persons " indicated the testator, or life-tenant, on whose death the funds passed. It was contended for the Crown that the court must have regard to the intention of the Legislature, which was that foreign investors should invest in those loans on the assurance that they and their estates would escape taxation; that it was the original investor who was protected as a testator and that otherwise the purpose of the Act would be defeated.

DANCKWERTS, J., said that it was the death of the tenant for life which attracted the duty: there could be no claim for duty during her lifetime. Further, it was only on death that the property passed. On death there was a slight and imperceptible period of time before liability to duty arose (see *In re Magan* [1922] 2 I.R. 208). Accordingly, the beneficial interest referred to in the Acts must be that of the successors, not of the preceding life-tenant. The gifts were, therefore, free of estate duty so far as the beneficiaries resident abroad were concerned.

APPEARANCES: *Milner Holland*, K.C., and *J. A. Wolfe* (*Freshfields*); *Gerald Upjohn*, K.C., and *J. H. Stamp* (*Solicitor of Inland Revenue.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

PROBATE, DIVORCE AND ADMIRALTY DIVISION

ESTATE INCREASED BY AWARD OF DAMAGES: CLAIM FOR ADMINISTRATION COSTS

Thomas *v.* Cunard White Star, Ltd. (The *Queen Mary*)

Willmer, J. 2nd November, 1950

Summons in objection to the registrar's report.

The plaintiff was the administrator of a seaman who lost his life in a collision at sea for which the defendants' ship was held partly to blame, and who died intestate and without leaving dependants. The whole of the damages recovered by the plaintiff under the Law Reform (Miscellaneous Provisions) Act, 1934, was for the benefit of the deceased's estate. Apart from the damages recovered in the action, the estate of the deceased was so small that no grant of administration would have been required; but a grant was obtained by the plaintiff in 1945 solely for the purpose of bringing the present action, and those costs were duly allowed by the registrar. As the estate of the deceased was very materially increased in value by the damages recovered under the Act of 1934, it became necessary for the plaintiff to file a corrective affidavit, and certain further expenses were necessarily and properly incurred in connection with the administration of the estate. Those expenses also were included in the plaintiff's bill of costs in the present action. The registrar disallowed those further expenses and the plaintiff now objected to his decision.

WILLMER, J., said that the expenses in question were incurred after the plaintiff had successfully prosecuted his action to judgment, and were in no sense necessary for the purposes of enabling him to obtain that judgment. It was impossible notionally to ante-date those expenses and to treat them as part of the expenses of obtaining the grant, which they clearly were not. To do so would be contrary to R.S.C., Ord. 65, r. 27 (29) (see *per* Malins, V.-C., in *Smith* v. *Buller* (1875), 19 Eq. 473, at p. 475).

The costs in question here were incurred after the litigation was over, so as to enable the estate, increased in value as it was as the result of the litigation, to be properly administered. The defendants had no more concern with that than they would have had with expenses subsequently incurred in consequence of disputes between rival claimants over the distribution of the assets. Appeal dismissed.

APPEARANCES: *P. Bucknill* (*Botterell & Roche*); *S. O. Olson* (*Hill, Dickinson & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

HOUSE OF COMMONS

QUESTIONS

The PRESIDENT OF THE BOARD OF TRADE stated that the assets of a British subject resident in enemy territory who had no other nationality had been released from control. But the assets of British subjects who had acquired an enemy nationality were only released in the case of British-born wives who had regained British nationality and who had returned to the United Kingdom for permanent residence. [14th December.

Mr. CHUTER EDE stated that he was aware that a recent conference of prison and Borstal visiting committees and boards of visitors had passed a resolution which expressed concern as to the efficient use of prison labour and the provision of vocational training in prisons. He hoped that recent inter-departmental discussions would result in an increased number of orders for the products of prison labour. [14th December.

Mr. CHUTER EDE said that it was not at present possible for him to say when it would be practicable to introduce legislation to amend the Shops Acts. A measure had been brought forward for the consolidation of the law, which would help, and he hoped that it might be possible to deal with the matter. [14th December.

Lieut.-Col. LIPTON asked the Home Secretary whether, in view of the congestion in certain Metropolitan magistrates courts, he would arrange for the court at Rochester Row, Westminster, to be reopened. Mr. CHUTER EDE declined to do so. The court was not usable, having been badly damaged during the war. As soon as the capital investment programme permitted, it was proposed, as recommended by the Departmental Committee which reported in 1937, to begin the building of larger court houses so as to relieve the congestion at some of the courts. Col. LIPTON, in a supplementary question, asked whether the Minister would consider a provisional arrangement whereby these courts could be rebuilt. Mr. EDE said he was quite willing to consider any arrangement. [14th December.

The CHANCELLOR OF THE EXCHEQUER stated that the Chairman of the Central Land Board had reported to him that examination of the claims under Pt. VI of the Town and Country Planning Act, 1947, disclosed that one of the provisions of s. 62 (1) was giving rise to serious anomalies in some cases.

It might happen that a piece of land, owing to its proximity to a piece of land developed in a particular way, such as an isolated factory, might have had a high value before the Act for the purpose of extending that development, but, apart from the prospect of that special development, had little value—save for the purposes to which it was actually being put.

Subsection (1) of s. 62 of the Act provided that rr. (2), (3) and (4) of the Rules set out in s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, were to apply in computing values under Pt. VI as they applied in relation to the compulsory purchase of interests in land. Rule (3) provided, among other things, that the special suitability or adaptability of land for any purpose should not be taken into account if that purpose was one for which there was no market, apart from the special needs of a particular purchaser. Where, on the appointed day (1st July, 1948), a piece of land was in fact held by the owner of the adjoining land to whom, and to whom alone, it possessed this special value, the effect of r. (3) was to reduce to little or nothing the development value disclosed by the claim, despite the fact that a substantial development charge might be incurred if the piece of land was, in fact, developed in this very likely manner.

Mr. GAITSKELL said he had therefore requested the Central Land Board, when valuing claims under Pt. VI, to proceed on the basis of disregarding the provisions of r. (3) in cases where the land was held before the appointed day by the claiming owner for the purpose of development in connection with his business carried

on on adjoining land. Amending legislation would be needed, but the Central Land Board would meanwhile proceed on the basis indicated.

This arrangement would apply to the claims of owners of land held for the extension of their own factory. It would also apply, in some cases, where a building or a plot of land adjoining a commercial property was held before the appointed day for incorporation within that property. It would not apply to any case where the land was not owned on the appointed day by the person to whom it had this special value. Neither would it apply to cases where it was claimed that a dwelling-house might be extended over its garden; nor to increase the unrestricted value of a part of a building above that which it would have in the open market, apart from the needs of the owner of the remainder.

It would not be practicable at this late stage to allow further claims to be made on the £300 million, even though potential claimants deliberately omitted to put in claims within the time limits prescribed by the Act and the regulations because they had thought that the application of r. (3) would render a claim fruitless. Until the scheme to be made under s. 58 had been drafted, he could not say what steps it would be necessary to take to meet cases of hardship which might be found to have arisen from this cause. If such cases were reported to the Board they would be carefully recorded for future consideration.

[15th December.

STATUTORY INSTRUMENTS

County Court (Amendment No. 2) Rules, 1950. (S.I. 1950 No. 1993 (L. 29).)

These rules contain a number of amendments to the County Court Rules, 1936, mostly drafting amendments consequential on the County Court (Amendment) Rules, 1950. Among the procedural amendments are these: A litigant or his solicitor is enabled to serve an originating application; the exemption of claims not exceeding £2 from the necessity of filing particulars of claim is revoked; the registrar is enabled to disregard the provisions governing the effect upon the scale of costs of a payment into court. See also p. 846, *ante*.

Feeding Stuffs (Manufacture) Order, 1950. (S.I. 1950 No.1988.)

Feeding Stuffs (Prices) (Amendment No. 4) Order, 1950. (S.I. 1950 No. 2018.)

Hairdressing Undertakings Wages Council (Great Britain) Wages Regulation Order, 1950. (S.I. 1950 No. 1982.)

Iron and Steel Prices (No. 5) Order, 1950. (S.I. 1950 No. 1986.)

Live Poultry (East Anglia) (Restrictions) Order, 1950. (S.I. 1950 No. 2019.)

Draft **National Insurance** (Industrial Injuries) (Mariners) Amendment Regulations, 1950.

Railway Freight Rebates Scheme, Modification Order, 1950. (S.I. 1950 No. 1985.)

Superannuation (Wisbech Water Works Company and Wisbech and District Water Board) Interchange Rules, 1950. (S.I. 1950 No. 1987.)

Teachers' Superannuation (Training within Industry) Scheme, 1950. (S.I. 1950 No. 1994.)

Trucial States Order in Council, 1950. (S.I. 1950 No. 1967.)

Tuberculosis (Area Eradication) Order, 1950. (S.I. 1950 No. 2006.)

Tuberculosis (Compensation) Order, 1950. (S.I. 1950 No. 2005.)

Tuberculosis (Slaughter of Reactors) Order, 1950. (S.I. 1950 No. 2007.)

Utility Apparel (Men's, Youths' and Boys' Outerwear) (Manufacture and Supply) (No. 2) Order, 1950. (S.I. 1950 No. 1959.)

Utility Handkerchiefs (Maximum Prices) (Amendment No. 7) Order, 1950. (S.I. 1950 No. 1980.)

NOTES AND NEWS

Honours and Appointments

Mr. J. G. BARR, town clerk and clerk of the peace of Ipswich, has been appointed solicitor and parliamentary officer to the London County Council.

Mr. HARRY CROSSLEY has been appointed to succeed Mr. R. N. Hutchins as assistant solicitor to Derbyshire County Council.

Mr. D. W. L. GRIFFITHS has been appointed assistant solicitor to the Cardiganshire County Council.

Miscellaneous

An agreement has been concluded between the British and Israel Governments whereby the time for making belated applications for United Kingdom patents or for registration of industrial designs with priority based on a corresponding application in Israel on or after 15th May, 1947, may be extended until a date not later than 31st January, 1951. A corresponding extension will be granted by the Government of Israel for making applications in that country founded upon applications in the United Kingdom (Patents (Extension of Time) (Israel) Rules, 1950: S.I. 1950 No. 2024; Registered Designs (Extension of Time) (Israel) Rules, 1950: S.I. 1950 No. 2025).

At The Law Society's Intermediate Examination, held on 9th and 10th November, of twenty-seven candidates for the whole examination, twenty-two passed the law portion and seventeen the trust accounts and book-keeping portion. Of 224 candidates for the law portion only, 145 passed, and of 296 candidates for the trust accounts and book-keeping portion only, 232 passed.

The funeral of Sir Harold Nevil Smart took place at Golders Green Crematorium on 18th December. Preb. Herbert T. Carnegie officiated. Those present included: Lady Smart (widow), Flight-Lieutenant Michael Smart (son), Mr. and Mrs. David Scott (son-in-law and daughter), Colonel and Mrs. H. M. Newsum, Mr. N. Newsum, Mr. L. Christie, Mrs. V. H. Seymour, Dr. and Mrs. Bruce Maclean, The Hon. Luke White, Mr. and Mrs. F. J. Rentoul, Mr. G. D. Shaw (representing chairman and clerk, Hampstead Justices), Mr. L. S. Holmes (president, The Law Society) with Mr. G. Collins (vice-president) and Mr. T. G. Lund (secretary), Mr. Gordon L. H. R. Shield, Commander Harry Vandervell (R.N.V.R. Club), Miss N. B. Adams (matron, Willesden General Hospital) with Mr. John N. Drake (secretary) and Mr. Philip R. Johnston (Master, City of London Solicitors' Company).

OBITUARY

MR. B. W. ATTLEE

Mr. Bartram Waller Attlee, solicitor, of Romsey, county court registrar, died on 16th December, aged 80. Admitted in 1893, he was a cousin of the Prime Minister.

MR. H. E. TRANGMAR

Mr. Herbert Edward Trangmar, retired solicitor, of Hove, died on 13th November. He was admitted in 1897.

SOCIETIES

At their sixty-fifth annual meeting the DERBY LAW SOCIETY elected Mr. C. R. Lymn, of Matlock, to be President. Other officers appointed included: Mr. F. O. Bates, of Derby (Vice-President), Mr. A. V. Nutt, of Derby (Hon. Treasurer), Mr. Alan Haldenby, of Derby (Hon. Secretary). Committee members elected were: H. S. Rees, C. S. Bowring, H. C. Copestake, E. W. Tilley, B. Johnson, A. S. Moore, G. B. Robotham, D. A. S. Cash, J. H. Richardson, N. R. Pinder, J. A. Garnett, F. W. Barnett (Derby), R. A. Waldron (Ashbourne), P. B. Mather (Chesterfield), T. Wilson (Belper), D. Worth (Burton) and H. W. Timms (Swadlincote).

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